HONG LEONG FINANCE BHD

v.

MAXDOUBLE CONSTRUCTION (M) SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
KANG HWEE GEE J
[SUIT NO: D8-22-256-2004]
17 JULY 2008

HIRE PURCHASE: *Agreement - Breach - Failure to pay instalments - Termination of agreement - Whether plaintiff entitled to claim arrears of instalments due at point of termination or all instalments due under agreement - Liability of guarantor - Whether second and fourth defendants liable to pay - Whether defendants liable as guarantors and indemnors under the joint and several guarantees which they signed with plaintiff*

CIVIL PROCEDURE: *Action - Discontinuance of - Whether an abandonment of claim - Whether defendants' liabilities discharged by discontinuance of previous suit against them - Term 'with liberty' used to reserve right of party to file action afresh - Whether plaintiff entitled to file fresh action based on what was due and owing*

The plaintiff's claim against the first defendant was for sums owed under seven hire purchase agreements based on similar terms of construction equipment contracted outside the Hire Purchase Act 1967. The second to fourth defendants were joint and several guarantors of the hire purchase agreements *vide* a joint and several letters of guarantee and indemnity signed by them. Briefly, in 1998, the first defendant had committed an event of default (cl. 4.1 of the hire purchase agreements) in failing to make payment of the instalments due. Consequently, a letter of demand was issued and when the first defendant failed to pay, legal action was commenced. The plaintiff contended that the action was discontinued on 6 September 2000 *vide* a notice of discontinuance with liberty to file afresh after the first defendant had made some payments. Subsequently, there was another default (on top of the amount outstanding following the part payment to the previous default) and the plaintiff commenced this action for the recovery of the balance sums due and owing. However, according to the defendants, the hire purchase agreements the plaintiff was relying on had been terminated *vide* a letter dated 28 August 1998. Pursuant to the termination letter, the plaintiff filed the first suit

claiming for arrears of rental and damages. Subsequently the plaintiff filed an O. 14 application to recover the sums owing under the hire purchase agreements but withdrew the whole action *vide* a letter dated 21 July 2000. According to the defendants, there was clear withdrawal of the entire claim against all the defendants and therefore the present suit was superfluous. The defendants submitted that the withdrawal of the suit was unconditional and was made because the first defendant had paid up the instalment to the satisfaction of the plaintiff who was prepared to discharge the first defendant of all debts owed to the plaintiff under the hire purchase agreements. Further, it was submitted that there was a variation of the original agreement between the plaintiff and the first defendant by reason that plaintiff had accepted payments from the first defendant after the withdrawal of the first suit, thus the plaintiff could not now make a claim against the guarantors (second and fourth defendants). The defendants argued the plaintiff could not now bring a fresh action. The issues that arose herein: (i) whether the defendants were liable as guarantors and indemnors under the joint and several guarantees which they had signed with the plaintiff; (ii) whether the first defendant hirer and the second and fourth defendants joint and several guarantors' liabilities were discharged by the discontinuance of the previous suit against all of them.

Held:

(1) The seven hire purchase agreements had been terminated *vide* the letter dated 28 August 1998 by the plaintiff owner. It followed that the first defendant was liable to pay the plaintiff the sum demanded under the said hire purchase agreements as per the plaintiff's notice of the same date mentioned above. There was no merit in the submission that in law the plaintiff was only entitled to claim arrears of instalments due at the point of termination and not all the instalments due under the agreement. The parties were bound by the agreements they signed and under cl. 9 of the agreement the plaintiff could claim such sums mentioned thereunder before and after the termination of the agreement as the plaintiff had done in this case. As joint and several guarantors and indemnors, the second and fourth defendants were therefore liable to pay the plaintiff what the first defendant did not pay. (paras 13, 15, 16 & 17)

(2) A discontinuance of the action is not necessarily an abandonment of a claim to release the defendants of all obligations under the action. There was no evidence that the parties had agreed to release the defendants from their obligations by the discontinuance. On the contrary the plaintiff's letter dated 21 July 2000 to the defendants stated clearly that the withdrawal was 'with liberty' a term commonly used to reserve the right of a party to file an action afresh. The plaintiff was entitled to file a fresh action based on what was due and owing taking into consideration such payments that may have been made after the first suit was filed to constitute a new action. (paras 18, 19, 21 & 23)

[Order accordingly.]

Case(s) referred to:

Chan Yoke Lain v. Pacific & Orient Insurance Co Sdn Bhd [1999] 1 CLJ 179 CA ***(refd)***

Green v. Rozen & Ors [1955] 2 QBD 797 ***(refd)***

Hj Taib v. Ismail [1971] 2 MLJ 37 ***(refd)***

Johnson and Another v. Moreton [1978] 3 All ER 37 ***(refd)***

Khan v. Goleccha International Ltd [1980] 2 All ER 259 ***(refd)***

Kidurong Land Sdn Bhd & Anor v. Lim Gaik Hua & Ors [1990] 1 CLJ 687; [1990] 1 CLJ (Rep) 141 ***(refd)***

Leong Weng Choon v. Consolidated Leasing (M) Sdn Bhd [1998] 3 CLJ 619 CA ***(refd)***

LSSC Development Sdn Bhd v. Thomas Iruthayam & Anor [2007] 2 CLJ 434 CA ***(refd)***

Mok Hin Wah & Ors v. United Malayan Banking Corp Bhd [1987] 2 CLJ 197; [1987] 2 CLJ (Rep) 219 ***(refd)***

Moschi v. Leo Air Services Ltd [1973] AC 331 ***(refd)***

Paul Raj Samy Raj v. Annamalar Anthonysamy [2003] 3 CLJ 166 HC ***(dist)***

Poh Geok Sing v. HB Enterprise Sdn Bhd [2006] 1 CLJ 765 CA ***(refd)***

Tempil Perkakas Sdn Bhd v. Foo Sex Hong (t/a Agrodrive Engineering) [1996] 2 MLJ 542 ***(refd)***

Ward v. National Bank of New Zealand [1883] 8 App Cas ***(refd)***

Woodchester Lease Management Services Ltd v. Swain & Co (A firm) [1999] 1 WLR 263 ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 40, 76, 92

Evidence Act 1950, s. 114(g)

Rules of the High Court 1980, O. 14, O. 21 r. 2(4), 3, 4

Other source(s) referred to:
Dr John Philips & Dr James O'Donovan, *The Modern Contract of Guarantee,* 2nd edn, p 328
Halsbury's Laws of Malaysia, p 318
Visu Sinnadurai's Law of Contract, 3rd edn, para 12.25

For the plaintiff - SY Ng; M/s Raja Darryl & Loh
For the 1st defendant - A Kuttiah; M/s Ku & Partners
For the 2nd & 4th defendants - Mohamad Khairil Abidin; M/s Kean Chye & Sivalingam

Reported by Suhainah Wahiduddin

JUDGMENT

Kang Hwee Gee J:

[1] This case was commenced before the late Justice Abdul Wahab bin Said Ahmad who before his untimely death had completed hearing the first witness for the defendants (DW1) leaving only the 2nd witness for the defendant (DW2) to be examined, cross-examined and re-examined before the defendants closed their case.

[2] The parties are agreed that I should proceed to adjudicate on this case by relying only on the evidence recorded by the late Abdul Wahab bin Said Ahmad J, the evidence of DW2 who was examined before me and the submissions of the parties.

[3] The plaintiff's claim against the 1st defendant is for sums owed under seven hire purchase agreements based on similar terms of construction equipment contracted outside the Hire Purchase Act 1967.

[4] The 2nd to 4th defendants are joint and several guarantors of the hire purchase agreements *vide* a joint and several letters of guarantee and indemnity signed by them.

[5] The case for the plaintiff is as follows:

i. In 1998 the 1st defendant had committed an event of default (under cl. 4.1 of the hire purchase agreements) in failing to make payment of the instalments due. Consequently a letter of demand was issued and on the 1st defendant failing to pay, legal action was commenced at the Kuala Lumpur High Court *vide* Suit No. D5-22-4724-1998.

ii. The plaintiff contends that the action was discontinued on 6 September 2000 *vide* a notice of discontinuance with liberty to file afresh after the 1st defendant made some payments.

iii. Subsequently there was another default (on top of the amount outstanding following the part payment to the previous default) and the plaintiff commenced this action for the recovery of the balance sums due and owing as at 1 October 2003.

iv. Initially when the first action was filed the defendants had owed sums under 11 hire purchase agreements. In the present action however the plaintiff is only claiming the balance sums owed in respect of the 7 out of the 11 hire purchase agreements, the four being fully settled.

[6] The case for the 1st defendant is as follows:

i. There is no cause of action in this present suit. The 11 hire purchase agreements including the present 7 which the plaintiff is relying on had been terminated *vide* the letter dated 28 August 1998 before they filed the 1st suit D5-22-4724-1998. This letter read as follows:

Raja, Darryl & Loh

187.448589/lk — Registered/ Ordinary Post

Maxdouble Construction (M)
Sdn Bhd
No. 62C Jalan Lumut
Damai Complex
54000 Kuala Lumpur.

28th August 1998

Dear Sirs,

Re: Hong Leong Finance Berhad
Arrears of rentals in respect of various
Hire Purchase Agreements

We act for Hong Leong Finance Berhad of Level 1, Wisma Hong Leong, 18 Jalan Perak, 50450 Kuala Lumpur and refer to our previous letter to you dated 30th July 1998.

2. Our client informs us that you have notwithstanding the abovementioned letter failed to pay the arrears of instalments.

3. Take Notice that by your persistent defaults in payment you have evinced an intention no longer to be bound by the said agreements or alternatively refused to be bound thereby and you have thereby repudiated the said agreements. Our client accepts your repudiation and you are no longer in possession of the goods comprised in the said agreements with our client's consent.

4. Further or in the alternative our client also hereby gives you notice of immediate determination of the hiring and/or the said agreements. You are accordingly no longer in possession of the said goods with our client's consent.

5. Our client's instructions are to demand from you which we hereby do the sums of RM133,181.89, RM133,114.50, RM149,252.93, RM90,986.75, RM147,215.30, RM138,713.94, RM127,544.70, RM30,243.67, RM30,243.67, RM30,243.67 and RM30,243.67, which sums are computed as follows:-

5.1 **With respect to Hire Purchase Agreement No. 154-40-01107-6**

Description of Goods:-

1 unit of new BSP HH 357-9 IV Hydraulic Pile Hammer with:-

- 7 tons ram weight of 1x1 ton top Segment, 2x2 tons intermediate segment and 1x2 tons bottom segment
- Improved type control station with armoured cable
- Back Guide
- Tie rod for 3,5, and 7 tons change
- Halmet Drive Cap
- Hose Manifold
- Actuator Set, complete
- 28m Hudraulic Hoses

Serial No: S357289 Power Pack No: PE6-011941-FP026

Hire Purchase Price	RM	362,544.00
Less: Deposit	RM	31,200.00
Instalments paid	RM	188,682.00
Prepaid instalment	RM	9,204.00
Rebate	RM	3,415.14

Add: Late payment interest as at 26.8.98	RM	3,117.03
Other charges	RM	22.00
	RM	133,181.89

5.2 **With respect to Hire Purchase Agreement No. 154-40-01108-4**

Description of Goods:-

1 unit of new BSP HH 357-9 IV Hydraulic Pile Hammer with:-

- 7 tons ram weight of 1x1 ton top segment, 2x2 tons intermediate segment and 1x2 tons bottom segment
- Improved type control station with armoured cable
- Back Guide
- Tie rod for 3,5, and 7 tons change
- Halmet Drive Cap
- Hose Manifold
- Actuator Set, complete
- 28m Hudraulic Hoses

Serial No: S357327 Power Pack No: PE6-040253T-R0038

Hire Purchase Price	RM	362,544.00
Less: Deposit	RM	31,200.00
Instalments paid	RM	188,682.00
Prepaid instalment	RM	9,204.00
Rebate	RM	3,415.14
Add: Late payment interest as at 26.8.98	RM	3,049.64
Other charges	RM	22.00
	RM	133,114.50

5.3 **With respect to Hire Purchase Agreement No. 154-40-01291-9**

Description of Goods:-

1 unit of new BSP HH 357-9 IV Hydraulic Pile Hammer with:-

- 7 tons ram weight of 1x1 ton top segment, 2x2 tons intermediate segment and 1x2 tons bottom segment
- Improved type control station with armoured cable
- Back Guide
- Tie rod for 3,5, and 7 tons change
- Halmet Drive Cap
- Hose Manifold
- Actuator Set, complete
- 28m Hudraulic Hoses

Hire Purchase Price		RM	362,544.00
Less:	Deposit	RM	31,200.00
	Instalments paid	RM	170,274.00
	Prepaid instalment	RM	9,204.00
	Rebate	RM	5,008.87
Add:	Late payment interest as at 26.8.98	RM	2,371.80
	Other charges	RM	24.00
		RM	149,252.93

5.4 **With respect to Hire Purchase Agreement No. 154-40-01542-0**

Description of Goods:-

Dry Concrete Plant Model: KL-5

Hire Purchase Price		RM	238,350.00
Less:	Deposit	RM	21,000.00
	Instalments paid	RM	119,542.50
	Prepaid instalment	RM	7,245.00
	Rebate	RM	1,707.10

Add:	Late payment interest as at 26.8.98	RM	2,107.35
	Other charges	RM	24.00
		RM	90,986.75

5.5 **With respect to Hire Purchase Agreement No. 154-40-01557-8**

Description of Goods:-

1 unit Piling Machine bearing
Regn No. WET 4666

Hire Purchase Price		RM	321,892.00
Less:	Deposit	RM	27,700.00
	Instalments paid	RM	134,838.00
	Prepaid instalment	RM	8,172.00
	Rebate	RM	6,133.89
Add:	Late payment interest as at 26.8.98	RM	2,143.19
	Other charges	RM	24.00
		RM	147,215.30

5.6 **With respect to Hire Purchase Agreement No. 154-40-01558-6**

Description of Goods:-

1 unit Piling Machine bearing
Regn No. WES 2317

Hire Purchase Price		RM	303,300.00
Less:	Deposit	RM	26,100.00
	Instalments paid	RM	127,050.00
	Prepaid instalment	RM	7,700.00
	Rebate	RM	5,779.73
Add:	Late payment interest as at 26.8.98	RM	2,019.67
	Other charges	RM	24.00
		RM	138,713.94

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5.7 **With respect to Hire Purchase Agreement No. 154-40-01559-4**

Description of Goods:-
1 unit Crawler Crane bearing
Regn No. WES 7759

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Hire Purchase Price		RM	278,880.00
Less:	Deposit	RM	24,000.00
	Instalments paid	RM	116,820.00
	Prepaid instalment	RM	7,080.00
	Rebate	RM	5,312.44
Add:	Late payment interest as at 26.8.98	RM	1,853.14
	Other charges	RM	24.00
		RM	127,544.70

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5.8 **With respect to Hire Purchase Agreement No. 154-40-01567-5**

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Description of Goods:-
1 unit Mixer Truck bearing
Regn No. JCD 5594

Hire Purchase Price		RM	79,450.00
Less:	Deposit	RM	7,000.00
	Instalments paid	RM	39,847.50
	Prepaid instalment	RM	2,415.00
	Rebate	RM	569.04
Add:	Late payment interest as at 26.8.98	RM	601.21
	Other charges	RM	24.00
		RM	30,243.67

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5.9 **With respect to Hire Purchase Agreement No. 154-40-01568-3**

Description of Goods:-

1 unit Mixer Truck bearing
Regn No. JCD 5597

Hire Purchase Price		RM	79,450.00
Less:	Deposit	RM	7,000.00
	Instalments paid	RM	39,847.50
	Prepaid instalment	RM	2,415.00
	Rebate	RM	569.04
Add:	Late payment interest as at 26.8.98	RM	601.21
	Other charges	RM	24.00
		RM	30,243.67

5.10 **With respect to Hire Purchase Agreement No. 154-40-01569-1**

Description of Goods:-

1 unit Mixer Truck bearing
Regn No. JCD 5604

Hire Purchase Price		RM	79,450.00
Less:	Deposit	RM	7,000.00
	Instalments paid	RM	39,847.50
	Prepaid instalment	RM	2,415.00
	Rebate	RM	569.04
Add:	Late payment interest as at 26.8.98	RM	601.21
	Other charges	RM	24.00
		RM	30,243.67

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5.11 **With respect to Hire Purchase Agreement No. 154-40-01570-5**

Description of Goods:-

1 unit Mixer Truck bearing Regn No. WBR 9742

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Hire Purchase Price		RM	79,450.00
Less:	Deposit	RM	7,000.00
	Instalments paid	RM	39,847.50
	Prepaid instalment	RM	2,415.00
C	Rebate	RM	569.04
Add:	Late payment interest as at 26.8.98	RM	601.21
	Other charges	RM	24.00
D		RM	30,243.67

6. Take Further Notice that you are required to pay us, as Solicitors, the aforesaid sums of RM133,181.89, RM133,114.50, RM149,252.93, RM90,986.75, RM147,215.30, RM138,713.94, RM127,544.70, RM30,243.67, RM30,243.67, RM30,243.67 and RM30,243.67 together with the sum of RM700.00 as our Solicitors' costs and to deliver the said goods to our client at our client's premises as stated herein within seven (7) days from the date hereof failing which our instructions are to file proceedings against you for the recovery thereof together with all accrued interest, costs and expenses.

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Yours faithfully,

G Sgd.

c.c. Guarantors 1. Chen Jin Ah
2. Kua Sim Taat
3. Ng Sek Wah

Client

H 4485891od.bk.

ii. Pursuant to the termination letter the plaintiff filed the suit D5-22-4724-1998 claiming for arrears of rental and damages. Subsequently the plaintiff filed an O. 14 application to recover the sums owing under the 11 hire purchase agreements but withdrew the whole action *vide* a letter dated 21 July 2000 which read as follows:

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nsy.448589.nsy.lk

Messrs SN Fam & Co
8-1-2 Jalan Radin Anum
Bandar Baru Seri Petaling
57000 Kuala Lumpur (Ref: 1-9-2-99-0003.pk)

Messrs Sivananthan
253, 4th Floor
Jln Tun Sambanthan
50470 Kuala Lumpur (Ref: C13.1068.99)

21st July 2000

Dear Sirs,

Re: Maxdouble Construction (M) Sdn Bhd & 3 Ors
KL High Court Suit No. D5-22-4724-98

We refer to our client's application for summary judgment fixed for 21st August 2000.

2. Kindly be informed that due to some part payments received and due to the repossession of some of the equipment we have been instructed to withdraw the application and the action with liberty.

Yours faithfully,
Sgd.

c.c. Client (Attn: Mr William Ho)

The telephone conversation with your Mr William Ho and our Ms Ng confirms the above instructions.

iii. The letter dated 21 July 2000 is a clear withdrawal of the entire claim against all the defendants. The present suit is therefore superfluous. The plaintiff should be estopped from filing another suit having withdrawn the 1st suit unconditionally.

iv. Between the date of withdrawal of the suit (21 July 2000) and the service of the letter of demand dated 1 December 2003 in respect of the present action, no notices of any kind was received by the defendants pertaining to any default on the hire purchase agreements. The defendants say that up to this date therefore no sums of money was outstanding in respect of all the 11 hire purchase agreements as they had been settled by the withdrawal of the 1st suit. This is confirmed in

A cross-examination by counsel for the 2nd and 4th defendants on the plaintiff's witness PW1 (credit control officer in charge of the plaintiff's company trading account) who said: "Yes" in answer to the question "Do you agree that the notice of the discontinuance was filed because you are satisfied with the
B payment received and proceeds of sale?" It is clear therefore the withdrawal of the suit was unconditional and was made because the 1st defendant had paid up the instalment to the satisfaction of the plaintiff who was prepared at this stage to discharge the 1st defendant of all debts owed to the plaintiff
C under the 11 hire purchase agreements. There is therefore no cause of action in the present suit – the cause having been disposed of in suit No. D5-22-4724-1998. There had been satisfaction and discharge as evidenced by the withdrawal.

D v. The old agreement had not been revived by any later agreement as it is clear that no action had been taken by the plaintiff after the withdrawal until three years later when it gave notice of demand in respect of the present claim.

E vi. By the plaintiff's own admission (PW1): "There are no new agreements (new hire purchase agreements) on which the plaintiff can take action." So the conclusion is that the plaintiff is suing on the 11 agreements which had been disposed of by the notice of discontinuance under O. 21.

F vii. The plaintiff having opted to treat the default of the 1st defendant in failing to pay the instalments as per agreement as a repudiation by the 1st defendant of the agreement and having elected to terminate the agreement on this ground cannot now bring a fresh action when the earlier action based
G on the same agreement had been withdrawn. The election to terminate on the part of the plaintiff is irrevocable. By initiating an action on this termination and thereafter discontinuing the action by notice under O. 21, the plaintiff cannot now bring a fresh action as the present.

H viii. The plaintiff's claim is in any case defective. The plaintiff did not justify in the trial that the amount owed as stated in the statement of claim by the 1st defendant was the amount owed as per evidence of its witness PW1. The amount in the
I statement of claim was stated as RM1,146,218.91 as at 24 February 2004 but PW1 admitted on cross-examination that

these claims from pp. 17 to 20 of the statement of claim from paras 17.1 to 17.7 that for all the 7 hire purchase agreements that the principal amount owing until 26 August 1998 comprising of arrears and loss is wrong.

ix. Further PW1 said the amount claimed in the statement of claim cannot be properly substantiated as PW1 said that the exhibits in Bundle F namely D25 to D31 payment vouchers from the 1st defendant to the plaintiff were not credited into the account of the defendants.

x. Further the plaintiff upon terminating the agreement with the 1st defendant is only entitled to claim arrears of instalments due at the point of termination and not all the instalments due under the agreement. See the case of *Woodchester Lease Management Services Ltd v. Swain & Co. (A firm)* [1999] 1 WLR 263 at 267:

> When contracting with a large financial organisation they are at a disadvantage. The contract is likely to be in standard form and relatively complex with a number of detailed provisions. If the hirer is said to have broken its terms, the hirer needs to know precisely what he or she is said to have done wrong and what he or she needs to do to put matters right. The lender has the ability and the resources to give that information with precision. If he does not do so accurately then he cannot take what Mr. Gruffydd conveniently referred to as "the next step."

Now see evidence of PW1 on cross examination at p. 11 of notes of evidence when he admits that he is claiming the full sum due under the hire and purchase agreement. This is prohibited in law as parties are released from their future obligation still to be performed where the plaintiff had terminated the contract. See *Visu Sinnadurai's Law of Contract,* 3rd edn at 12.25:

> **12.25 General effect of rescission.** The general effect of a discharge by breach is neatly summed up by *Anson's Law of Contact,* 27th edition, at page 550 as follows:
>
> > An innocent party who is entitled to, and does, choose to be treated as discharged by the other party's breach, is thereby released from further performance of those future obligations which remains still to be performed. After such

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> a discharge, the innocent is not bound to accept, or pay for, any further performance by the party; in breach. The duty of the party in default to perform future unperformed obligations likewise comes to an end, as does that party's right to perform them.

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See *LSSC Development Sdn Bhd v. Thomas Iruthayam & Anor* [2007] 2 CLJ 434. Here in our case plaintiff cannot claim for future instalment due on a hire purchase still undue as it had elected to terminate the contract. It can only claim the arrears of instalments plus damages. The provision in the agreement

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providing the plaintiff with the right to claim future undue instalments is against the principle of contract law.

xi. The effect of the rescission of the contract will deem that the innocent party will be entitled to claim the outstanding balance

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of instalment at the time and any unpaid instalments can only be claimed as damages. This is consistent with s. 40 and s. 76 of the Contracts Act 1950. See *Moschi v. Leo Air Services Ltd* [1973] AC 331 per Lord Reid. This case was followed by Gopal Sri Ram JCA in *Poh Geok Sing v. HB*

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Enterprise Sdn Bhd [2006] 1 CLJ 765 at p. 777:

> The Court of Appeal reached the same result by a different route. I am unable to accept some of their reasoning as to what happens when a contract is broken. In particular, I

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> cannot agree that after accepted repudiation the contractual obligations still exist as obligations. For the breach of any contract the normal remedy is damages in money. The contract may have been to deliver say 100 tons of wheat. If the party fails to deliver somehow that obligation disappears and by operation of law is replaced by an obligation to pay money.

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> So it appears to me that *when a contract is brought to an end by repudiation accepted by the other party all the obligations in the contract come to an end and they are replaced by operation of law by an obligation to pay money damages.* The damages are assessed by reference to the old obligations but the old obligations no

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> longer exist as obligations. Were it otherwise there would be in existence simultaneously two obligations, one to perform the contract and the other to pay damages. But that could not be right. The only legal nexus remaining is the obligation to pay the damages; so here when the respondents elected to end the company's contract by treating their fundamental breach as a

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> repudiation and accepting it, their right against the company became a right to get damages. (emphasis added.)

xii. See further *Leong Weng Choon v. Consolidated Leasing (M) Sdn Bhd* [1998] 3 CLJ 619 at 625 in hire purchase agreement per NH Chan JCA:

> Section 40 of the Contracts Act gives to the plaintiff (that is, the promisee) the right to elect to terminate the agreement and recover damages under s. 76 of the Act or to treat the agreement as alive and continuing.

xiii. The plaintiff in this case must follow the law with respect to s. 40 and s. 76 (s. 40 gives the right to plaintiff to terminate in the event of breach and s. 76 gives the right to recover damages as a result of the breach). Here the plaintiff terminated the contract and therefore it is entitled to claim only damages for breach of contract and not all the unpaid instalments. See *Johnson and Another v. Moreton* [1978] 3 All ER 37 House of Lords at p. 18:

> The truth is that it can no longer be treated as axiomatic that, in the absence of explicit language, the courts will permit contracting out of the provisions of an Act of Parliament where that Act, though silent as to the possibility of contracting out, nevertheless is manifestly passed for the protection of a class of persons who do not negotiate from a position of equal strength, but in whose well-being there is a public as well as a private interest. Such acts are not necessarily to be treated as simply *'jus pro se introductum',* a 'private remedy and a private right' which an individual member of the class may simply bargain away by reason of this freedom of contract. It is precisely his weakness as a negotiating party from which Parliament wishes to protect him.

xiv. See also *Haji Taib v. Ismail* [1971] 1 LNS 37 per Syed Agil Barakbah J:

> … a contract executed in contravention of a statute creating a duty or imposing obligation is invalid and unenforceable. This is expressed by the legal maxim: *pactis privatorum juri publico non derogatur*. Where a contract, express or implied, is expressly or by implication forbidden by statute, no court will lend its assistance to give it effect. To make a contract void or unenforceable it is not necessary that the statute should prohibit it under specific penalties or declare it illegal. It is also a well recognised principle of law that any contract will be held void, although it is not in contravention of the specific directions of a statute, if it is opposed to the general policy.

A xv. Having repudiated the hire purchase contract the plaintiff is only entitled to claim the arrears of instalments at the time of the termination by the plaintiff and damages. It is not entitled to claim the unpaid instalments still due at the time of termination.

B xvi. On notice of discontinuance: Three ways:

i) by a notice of discontinuance served on the defendants within 14 days of being served with the defence without leave. Use Form 36.

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ii) Order 21 by consent at any time before trial by producing to the registrar a written consent to the action being withdrawn by all the parties without leave of the court.

D iii) By application to the court (meaning with leave of the court).

In our case a notice of discontinuance was filed (see Item 14 in Bundle C) pursuant to action in D5-22-4724-1998. The notice was not signed by the solicitor for the 3rd defendant in this action. So it is not in compliance with O. 21 r. 2(4) which read as follows:

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> If all the parties to an action consent, the action may be withdrawn without the leave of the Court at any time before
> F trial by producing to the Registrar a written consent to the action being withdrawn signed by al the parties.

Here the 3rd defendant had not signed it. Hence the notice of discontinuance is invalid in so far as it purported to discontinue the action against one or all the parties in that
G suit. That being the case D5-22-4724-1998 is still subsisting and by filing the present suit there is duplicity of action. The *res judicata* sets in. The plaintiff is not entitled to bring this suit against the same defendants to be relegated. No doubt that
H the notice of withdrawal contained a phrase "dengan kebebasan menfailkan semula" but RK Nathan J in *Paul Raj Samy Raj v. Annamalar Anthonysamy* [2003] 3 CLJ 166 has held:

> (2) The applicant had no authority to state 'dengan
> I kebebasan' in the notice of discontinuance. Once the applicant applied under sub-r (2) by summons for leave to discontinue (or by consent of the respondent pursuant

to sub-r. (4)) and when an order is given by the court, the applicant must then proceed to extract that order of the court. The entire procedure adopted by the applicant was wrong and untenable.

So the notice is defective. The suit remains. *Halsbury's Laws of Malaysia* quote at 318:

[10.3-223] Withdrawal by consent without leave

If all the parties to an action consent, the action may be withdrawn without the leave of the court at any time before trial by producing to the Registrar a written consent to the action being withdrawn signed by all the parties[1]. The English courts have given effect to a contract to withdraw a claim[2].

1. RHC O. 21 r. 2(4). If the action is discontinued or withdrawn as part of the terms of a compromise, the compromise may not be made an order of the court unless the terms expressly so provide: see *Graves v. Graves* [1893] 69 LT 420; *Green v. Rozen* [1955] 2 All ER 797, [1955] 1 WLR 741; *McCallum v. Country Residences Ltd* [1965] 2 All ER 264, [1965] 1 WLR 657, CA (Eng).

2. *Macedonia Maritime Co v. Austin & Pickersgill* [1989] 2 Lloyd's Rep 73. Such an agreement operates as an irrevocable abandonment of the claims by the plaintiff: *Macedonia Maritime Co v. Austin & Pickersgill* [1989] 2 Llyod's Rep 73.

Submission By Counsel For The 2nd And 4th Defendants

[7] I adopt the submission of counsel for the 1st defendant Mr. Kuthiah. I would like to add a few other grounds for saying my clients are not liable as guarantors:

1. The plaintiff has not proved its claims against the defendants in two aspects:

   (i) The plaintiff has not proved the debt by way of evidence as it has not called material witnesses who have knowledge of the accounts and the dealings between the plaintiff and the defendants. There were two material witnesses – Mr. Wong Chin Seong and Mr. T.J. Tan, respectively manager

for credit control of the plaintiff and the officer involved in the discussion for settlement after the termination of the agreement and after the withdrawal of the first suit. These two persons did not give evidence in court to prove the plaintiff's claim itself. The plaintiff's witness Zainol Asri bin Mohd Saat, the credit control officer admitted at p. 5 that the ledger produced by the plaintiff was not prepared by him and that he has no personal knowledge of the actual transaction. He further confirms that the documents he produced to show the alleged debt was taken from the termination letter of the plaintiff which was prepared in 1998. He did not have any knowledge on the payment made by the 1st defendant. See pp. 7, 8 and 9 of the notes of evidence dated 1 June 2006. This court should therefore invoke the adverse presumption of s. 114(g) of the Evidence Act 1950 against the plaintiff that the debt as claimed was not owed. See Court of Appeal decision in *Chan Yoke Lain v. Pacific & Orient Insurance Co. Sdn. Bhd.* [1999] 1 CLJ 179 per Haidar JCA at 185:

> Counsel for the appellant also submitted that the learned judge should have invoked s. 114(g) of the Evidence Act 1950 against the respondent company for not calling David Lim or his clerk that the signature on D2 was not that of the deceased when it was the evidence of PW2 and PW3 that the deceased signed on both D1 and D2 on the same day. The presence of David Lim or his clerk who filled up the proposal forms would have cleared all doubt about the alleged non-signature of the deceased on D2. Not only was David Lim or his clerk not called, neither was any explanation given by the respondent company as to the non-availability of David Lim or his clerk who should be in the best position to give evidence on the signature in D2. The irresistible inference would be that if David Lim or his clerk is called, their evidence would be unfavourable to the respondent company. We are of the opinion that counsel for the appellant was justified on this point but unfortunately, the learned judge thought otherwise and declined to consider and invoke s. 114(g) of the Evidence Act 1950.

See also *Tempil Perkakas Sdn Bhd v. Foo Sex Hong (t/a Agrodrive Engineering)* [1996] 2 MLJ 542 at 543 Held:

(1) The evidence of PW1 in respect of events prior to the date of his appointment was clearly hearsay evidence and is therefore inadmissible. PW1 had no personal knowledge of the facts stated in his evidence and of the contents of the documents that he tendered in support of his evidence (see p 547E-F).

(2) Anything said or tendered through a witness which is not within the actual knowledge of the witness would remain inadmissible notwithstanding the omission to object by the opposing party. The opposing party cannot be taken to have admitted to what had been said and tendered (see p 547D-E).

In our case the witness Zainol Asri called by the plaintiff to show that the defendants owed the plaintiff the sum claimed cannot be accepted as a witness with respect to the debt owed and therefore we submit that the plaintiff has not proved its case on a balance of probability.

(ii) The effect of the notice of discontinuance. The plaintiff is now estopped from taking any further action by filing of this suit as the effect of the notice of discontinuance is itself embodied as an admission by the plaintiff of satisfaction of payments already made to the plaintiff and the repossession of some of the equipments. The relevant portion of the letter of admission (exh. "D24" of Bundle C) read as follows:

> Kindly be informed that due to some part payaments received and due to the repossession of some of the equipment **we have been instructed to withdraw the application and the action with liberty**.

Now see *Khan v. Goleccha International Ltd* [1980] 2 All ER 259 at 260:

> **Held –** For the purposes of issue estoppel an issue was settled and founded an issue estoppel in subsequent proceedings not only if it was embodied in the terms of the judgment in the action or implied therein because it was embodied in the decision delivered in court but also if it was embodied in an admission made in the face of the court or implied in a consent order. The concession made by the plaintiff in the Court of Appeal in the first action therefore founded an issue estoppel preventing the plaintiff from asserting in the second action that the transaction was a moneylending transaction …

Here the plaintiff is therefore estopped from filing this suit as the principle estoppel as inunciated in the *Boustead* case per Sri Ram JCA. The word "with liberty" must be interpreted in favour of the defendants to find that the parties had in fact come to an absolute compromise not to proceed to sue the defendants anew as any decision whether or not the plaintiff may file the action afresh would have to come from the decision of the court. See RK Nathan J in *Paul Raj Samy Raj v. Annamalar Anthonysamy* [2003] 6 MLJ 130 at Held (2):

> (2) The applicant had no authority to state 'dengan kebebasan' in the notice of discontinuance. Once the applicant applied under sub-r (2) by summons for leave to discontinue (or by consent of the respondent pursuant to sub-r (4)) and when an order is given by the court, the applicant must then proceed to extract that order of the court. The entire procedure adopted by the applicant was wrong and untenable (see p 136F-G).

2. There is a variation of the original agreement between the plaintiff and the 1st defendant by reason that plaintiff had accepted payments from the 1st defendant after the withdrawal of the first suit. The plaintiff cannot now make a claim against the guarantors (2nd and 4th defendants) as the original agreement has been varied. See *Kidurong Land Sdn Bhd & Anor v. Lim Gaik Hua & Ors* [1990] 1 MLJ 485 at 486 Held (3):

> There were material variations made to the development agreements. These variations were not insignificant. The variations prejudiced the third appellant and the undisputed evidence showed that there was no knowledge of or consent to the variations by him. The effect of the variations were such as to discharge the third appellant guarantor from his obligations in respect of the guarantees.

3. The letter of demand was never served on the 2nd and 4th defendants as the guarantors. Refer to notes of evidence dated 16 April 2007 where the 2nd defendant confirmed he did not receive any notice of demand and there was no AR Registered Card tendered in court to show that the notice of demand was served on him. Where a notice of demand is not sent to all the guarantors on a joint and several guarantee, the notice

is bad. See Salleh Abas LP in *Mok Hin Wah & Ors v. United Malayan Banking Corp. Bhd* [1987] 2 CLJ 197; [1987] 2 CLJ (Rep) 219 (cc copy not sufficient).

4. The fact that the plaintiff had decided to forego its rights to sue the 3rd defendant discharges the liability of the 2nd and 4th defendants. See s. 92 of the Contracts Act 1950 which read as follows:

> **92 Discharge of surety by creditor's act or omission impairing surety's eventual remedy**
>
> If the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged.

See *Ward v. National Bank of New Zealand* [1883] 8 App Cas. in *'The Modern Contract of Guarantee'* by Dr. John Philips and Dr. James O'Donovan (2nd edn) at p. 328.

[8] Reply By Counsel For The Plaintiff

The 1st issue – effect of notice of discontinuance filed by the plaintiff.

The 2nd issue – whether claim is defective.

The 3rd issue – whether plaintiff is entitled to claim balance of hire purchase instalments.

[9] 1st Issue: The solicitor for the 1st, 2nd and 4th defendants had executed the notice of the discontinuance which expressly provided for the plaintiff the liberty to file afresh. There is no evidence that the parties had proceeded under O. 21 to effect the settlement. The plaintiff contends that there is no bar to the plaintiff filing a fresh action as these defendants (1st, 2nd and 4th defendants) have consented to a discontinuance of the first action with liberty to the plaintiff to file afresh. This is to be distinguished from the case of *Paul Raj, supra* where the applicant had unilaterally filed a notice of discontinuance and the respondent then applied to set it aside. The court allowed the setting aside of the notice of discontinuance on the ground that the notice of discontinuance was made without the consent of the respondent

A and was not *bona fide*. Contrary to what was submitted by counsel for the defendants that all the four defendants must consent to the withdrawal of the action before the whole action can be discontinued, this is provided under O. 21 r. 2(4) which uses the words "if all the parties to an action consent".

B

[10] The defendants who had signed the notice of discontinuance by their solicitor are bound by the notice of discontinuance with liberty to file afresh. See *Green v. Rozen and Others* [1955] 2 QBD 797 where the term used was "liberty to either side to apply in C respect of some agreed terms which were recorded. It was held that there was an agreement compromising the action between the parties which completely superceded the original cause of action and the plaintiff's only remedy was bringing in an action afresh. Here in our case the defendants are estopped from disputing the D discontinuance of the first action because the plaintiff did in fact not act further on the action and the defendants began to make some payments. There was therefore a discontinuance of the action by the plaintiff to enable the defendants to pay. Hence we are at liberty to file this action without having to continue with E the first action.

Findings And Decision

[11] The dispute in this case can be disposed of by considering:

F i) whether the defendants were liable as guarantors and indemnors under the joint and several guarantees which they had signed with the plaintiff; and

ii) whether the 1st defendant hirer and the 2nd and 4th G defendants joint and several guarantors' liabilities were discharged by the discontinuance of the previous suit against all of them.

Whether The Defendants Liable As Joint And Several Guarantors

H

[12] Clause 8 of the hire purchase agreement says owner (the plaintiff in this case) may terminate agreement on default of monthly payments for the hire of the machines – the effect of which gives the owner under cl. 9 the right to possession of the I machines hired and the payment of overdue instalments before and after the termination "less the aggregate of:

(a) the sums previously paid under the agreement; A

(b) the net proceeds of sale of the goods if repossessed and sold or if not their value as determined by a dealer appointed by the owners; and

(c) a discount for the acceleration of payment computed according to the 'r. of 78' method." B

[13] It is clear that all the 7 hire purchase agreements had been terminated *vide* the letter dated 28 August 1998 by the plaintiff owner. The letter contained details of the sums owed before the C termination in respect of each hire purchase agreement taking into account the deductions under cl. 9(1)(a), (b) and (c) in respect of each agreement.

[14] It follows that the 1st defendant is liable to pay the plaintiff D the sum demanded under the 7 hire purchase agreements as per the plaintiff's notice dated 28 August 1998.

[15] The submission by the defendants that the plaintiff's claim was defective because the amount stated in the statement of claim E (RM1,146,218.91) as at 24 February 2004 was not substantiated by the witness for the plaintiff PW1, and that the vouchers D25 to D31 had not been credited to the 1st defendant's account is incorrect and taken out of context. It is clear from the notes of evidence recorded by the late Justice Abdul Wahab bin Said Ahmad at p. 18 that what the witness was saying is that the F payments were irregular because it did not follow the schedule of payments under the hire purchase agreements. The witness did not say the sum of RM1,146,218.91 as claimed under para. 18 of the statement of claim was wrong. The witness had explained G clearly in his witness statement that in arriving at a lesser sum of RM1,146,218.91 he had taken into account the payments made by the defendants to the original claim of RM1,366,036.47 thereby arriving at a figure of RM1,146,218.91 as pleaded in the statement of claim corresponding to the letter of demand dated 1 H December 2003 pertaining only to the 7 hire purchase agreements.

[16] Further there is also no merit in the submission that in law the plaintiff is only entitled to claim arrears of instalments due at the point of termination and not all the instalments due under the agreement. The parties are bound by the agreements they signed I

A and under cl. 9 of the agreement the plaintiff can claim such sums mentioned thereunder before and after the termination of the agreement as the plaintiff had done in this case.

[17] As joint and several guarantors and indemnors the 2nd and
B 4th defendants are therefore liable to pay the plaintiff what the 1st defendant did not pay.

Whether The Defendants' Liabilities Have Been Discharged By The Discontinuance Of The Previous Suit

C **[18]** A discontinuance of the action is not necessarily an abandonment of a claim to release the defendants of all obligations under the action.

[19] A discontinuance in respect of a suit filed in court it is to
D be appreciated is merely a discontinuance of the suit and not a withdrawal of any claim in that suit against the other party unless the parties are agreed that such discontinuance shall operate as a full discharge of the latter's obligation.

E **[20]** Indeed O. 21 r. 4 specifically provides (with respect to the discontinuance with leave from the court) that "Subject to any terms imposed by the court in granting leave under r. 3, the fact that a party has discontinued an action or counterclaim or withdrawn a particular claim made by him therein shall not be a
F defence to a subsequent action for the same, or substantially the same, cause of action." It would appear that the withdrawal in this instance is a discontinuance without leave under O. 21 r. 2 but the same reasoning should apply.

[21] There is no evidence that the parties had agreed to release
G the defendants from their obligations by the discontinuance. On the contrary the plaintiff's letter dated 21 July 2000 to the defendants stated clearly that the withdrawal was "with liberty", a term commonly used to reserve the right of a party to file an action afresh.

H

[22] The fact that the 3rd defendant did not appear to have signed by the solicitor for the 3rd defendant is immaterial. The liability of the 3rd defendant is joint and several and the plaintiff is not proceeding against the 3rd defendant who had since then
I passed away.

[23] The plaintiff is entitled to file a fresh action based on what is due and owing taking into consideration such payments that may have been made after the first suit was filed to constitute a new action.

[24] There shall be a judgment against the defendants as prayed.